IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 970

BROTHERHOOD OF RAILROAD TRAINMEN,
an Unincorporated Association,

Appellant,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, ERIE RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, PERE MARQUETTE RAILWAY COMPANY, and WABASH RAILROAD COMPANY,

Plaintiffs-Appellees,

INTERSTATE COMMERCE COMMISSION,
Intervening Plaintiff-Appellee,

THE CHICAGO RIVER AND INDIANA RAILROAD COMPANY, CHICAGO JUNCTION RAILWAY COMPANY, and THE NEW YORK CENTRAL RAILROAD COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF OF PLAINTIFFS-APPELLEES.

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April 28, 1947.

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF OF PLAINTIFFS-APPELLEES.

JURISDICTION ON APPEAL

Pursuant to the rules of this Court, plaintiffs-appellees filed a statement opposing the jurisdiction of this Court on this appeal

and a motion to dismiss the appeal for want of jurisdiction. Said motion to dismiss was based upon the claim that appellant had not shown such an interest in the suit as to entitle it to intervene as a matter of right, and that under the decision of this Court in *United States* v. *California Canneries*, 279 U. S. 553, 556, which is based on a long line of prior decisions, the order denying appellant's petition to intervene was not a final and appealable order. On March 3, 1947, this Court entered an order postponing further consideration of the question of its jurisdiction to the hearing on the merits.

Appellant asserts (Br. p. 2) that "Where intervention is asserted as a matter of right, it is well settled that an order denying such intervention is final, and is thus appealable." The cases cited by appellant in support of this statement do not, of course, sustain it, otherwise all that a petitioner to intervene would ever have to do in order to have an order denying the petition reviewed on appeal would be to claim intervention as a matter of right. Presumably what appellant intended to say was that if the petitioner makes such a showing in the court below as entitles him to intervene as of right, then an order denying intervention is appealable. There could be no disagreement with such a statement. The question here is, did appellant make such a showing? If it did not, then the order denying intervention is not appealable. If it did, then it is appealable. It is true that the decision of the question of the appealability of the order thus involves a decision on the merits of the appeal. But such fact would not seem to make a motion to dismiss for want of jurisdiction improper, since the motion affords this Court and the parties involved a possible opportunity to avoid delay in determining the issue raised by the appeal. *Allen Calculators* v. *National Cash Reg. Co.*, 322 U. S. 137, 142.

This brief is therefore a reply to appellant's contention (Br. p. 37) that the application of the Brotherhood to intervene, as

a matter of right, should have been granted. If appellant's position is not sustained, it cannot in the present status of this case make any material difference to plaintiffs-appellees whether this Court dismisses the appeal for want of jurisdiction or affirms the order of the court below denying intervention.

STATEMENT OF THE CASE

Inasmuch as appellant's statement of the case is incomplete and misleading and wholly inadequate to an understanding of the questions raised by its appeal, it is deemed necessary to make a full statement of the case here.

The Complaint of Plaintiffs-Appellees (R. 1-46)

As shown by the allegations of the complaint herein (R. 1-12), this is a suit under paragraph (12) of Section 16 of Part I of the Interstate Commerce Act (49 U.S.C.A. Sec. 16, par. 12) (R. 3) for the purpose, among others, of enjoining disobedience of a condition in an order of the Interstate Commerce Commission (hereinafter called the Commission) entered May 16, 1922, in the *Chicago Junction Case*, 71 I.C.C. 631.

Plaintiffs-Appellees (hereinafter referred to as "plaintiffs") are eight trunk line carriers engaged, *inter alia*, in the transportation by railroad of carload shipments of livestock, other than hogs and sheep, from the Union Stock Yards, Chicago, Illinois, to destinations east and southeast of Chicago (R. 2, 3).

Defendants-Appellees (hereinafter referred to as "defendants") are The New York Central Railroad Company (herein called the Central), The Chicago River and Indiana Railroad Company (herein called the River Road), and Chicago Junction Railway Company (herein called the Junction) (R. 2).

The Central is a trunk line carrier engaged, *inter alia*, in the same transportation as that of plaintiffs above referred to. The River Road is a switching line serving the Union Stock Yards, all of the capital stock of which is now owned and was acquired by the Central on May 19, 1922, pursuant to authority granted by said order of May 16, 1922, on certain conditions. The Junction is a railroad company which on May 16, 1922, and on the same conditions, leased its entire railroad to the River Road for 99 years, and thereafter, at the option of the lessee, in perpetuity, which lease is still in effect (R. 3–5).

Said order of May 16, 1922, was entered on an application filed by the Central with the Commission on December 28, 1920, for approval, *inter alia*, of the following proposed transactions (R. 13):

> "(a) The purchase by the Central of all of the capital stock of the Chicago River & Indiana Railroad Company, hereinafter termed the River Road;
>
> "(b) The leasing to the River Road of the properties (owned and leased) of the Chicago Junction Railway Company, hereinafter termed the Junction, for a term of 99 years and thereafter, at the option of the lessee, in perpetuity."

The report and order of the Commission (R. 12–37) entered on said application approved and authorized the acquisition by the Central of the control of the River Road by the purchase of its capital stock at a price not exceeding the sum of $750,000; approved and authorized the acquisition by the River Road of the control of the property (owned and leased) of the Junction by lease as set forth in said report; and provided further as follows (71 I.C.C., p. 650):

> "That the purchase and sale of said stock and the making of said lease, as herein authorized, shall in all future proceedings, judicial as well as administrative, to which the carriers above named, or any of them, may be parties, be

deemed and taken as conclusive evidence of their acceptance of and agreement to abide by the conditions enumerated in said report and numbered from 1 to 17, inclusive." (R. 36.)

The conditions so referred to included the following condition (71 I.C.C., p. 639):

> "3. The present traffic and operating relationships existing between the Junction and River Road and all carriers operating in Chicago shall be continued, in so far as such matters are within the control of the Central." (R. 22.)

After having enumerated the foregoing conditions in said report, the Commission made the following finding (71 I.C.C., p. 641):

> "*Subject to the observance of the above conditions, we find that the acquisition* by the Central of the capital stock of the River Road and the leasing to the River Road of the properties (owned and leased) of the Junction *will be in the public interest.*"* (R. 25.)

On December 3, 1928, the Commission made and entered its report on further hearing and order in said *Chicago Junction Case* (150 I.C.C., pp. 32–38) in which it amended condition 14 of its report and order of May 16, 1922, but said amendment is in no way pertinent to any issue in this case. As so amended said report and order of May 16, 1922, are still in full force and effect (R. 5).

On January 15, 1929, the District Court of the United States for the Northern District of Illinois, Eastern Division, in a proceeding entitled "*The Baltimore & Ohio Railroad Company, et al.* v. *United States of America, et al.*, In Equity No. 3427," in which all of the plaintiffs herein or their respective predecessors

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*Italics ours throughout unless otherwise indicated.

in interest and all of the defendants herein were parties, entered a final decree with respect to said order of May 16, 1922, by which it found and decreed as follows:

> "* * * and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties." (R. 5–6, 16.)

From May 20, 1922, to the present time the Central has had and now has control of the traffic and operating relationships existing between the Junction and the River Road on the one hand and the plaintiffs, respectively, on the other hand (R. 6).

On May 16, 1922, and for many years prior thereto, plaintiffs moved empty livestock cars used for the loading of livestock, other than hogs and sheep, *with their own power and crews* from their respective lines, via their respective connections with the line of the Junction now operated by the River Road under said lease of May 19, 1922, to places of loading on said line in said Union Stock Yards and, after they had been loaded, moved said cars from said places of loading *with their own power and crews* over said line to its connections with their respective lines and thence to destinations as consigned and routed by the shippers (R. 3).

Referring to this operating practice the Commission, in its report accompanying the order of May 16, 1922, said (71 I.C.C. p. 633):

> "All parties concede that that is the only practical method of handling that traffic." (R. 15.)

For the privilege of so moving said cars plaintiffs, respectively, on and immediately prior to May 16, 1922, and continuously thereafter to February 1, 1946, paid the River Road and the River Road accepted $1.00 per car, loaded and empty (R. 3).

On or about January 25, 1946, the Central and the River Road notified plaintiffs that on and after February 1, 1946, plaintiffs would not be permitted to move said stock cars as aforesaid, and that such cars when destined to places of loading on the line of the River Road in said Union Stock Yards would be moved by the power and crews of the River Road from the points of interchange with plaintiffs, respectively, on the line of the River Road to such places of loading and after they had been loaded at such places of loading by shippers, would be moved thence by the power and crews of the River Road to the points of interchange with plaintiffs, respectively, on the line of the River Road, and that at such points they would be delivered by the River Road to the plaintiffs, respectively, and that the charge of the River Road for such handling would be $12.96 per outbound loaded car instead of the charge of $1.00 per car loaded and empty, theretofore charged to and paid by the plaintiffs (R. 6–7).

On and after February 1, 1946, the Central and the River Road proceeded to act in accordance with said notice and this suit was brought by the plaintiffs on February 12, 1946, to compel obedience by the defendants to Condition 3 in said order of May 16, 1922, it being alleged that the aforesaid action of the defendants pursuant to said notice of January 25, 1946, was in violation of said condition (R. 7–12).

Intervention by the Commission (R. 47-49)

On February 21, 1946, pursuant to leave of court, the Commission filed its complaint of intervention (R. 47). The complaint of the Commission alleged that the action of the Central and the River Road in making the changes in operation which are above outlined "constituted and was discontinuance in part of 'the present traffic and operating relationships existing between the Junction and River Road' and the plaintiffs herein, and was and is in violation of the order of the Interstate Commerce Commission of May 16, 1922." The complaint further

alleged that by Section 5 (8) of the Interstate Commerce Act (49 U. S. Code Sec. 5 (8)) the Commission was authorized to seek, and the District Courts of the United States were given jurisdiction to afford, injunctive or mandatory relief to restrain violation of or compel obedience to an order issued under Section 5 of that Act. Preliminary and permanent injunctions were asked "restraining and enjoining the defendants and each of them, their respective officers, agents, representatives, servants, employees and successors from (a) failing and neglecting to obey said order of the Commission of May 16, 1922; (b) violating condition 3 of said order of the Commission of May 16, 1922." (R. 48.)

Stipulation of Facts (R. 50-57)

Plaintiffs, defendants and the Commission entered into a stipulation of facts to be considered as evidence in the cause on the hearing on the motions of the plaintiffs and the Commission for a preliminary injunction, which facts were to be taken as true and binding on the parties except that objections might be made to the relevancy and materiality thereof. The stipulation of facts admitted as true the facts above outlined from the allegations of the complaint (R. 50-55). Said stipulation of facts also recited that the Brotherhood of Railroad Trainmen (appellant herein), bargaining agent under the Railway Labor Act for River Road trainmen, having failed to settle certain disputes—among others a demand, claimed by said Brotherhood to be based upon a contract with the River Road, that River Road trainmen be given the work of moving and switching the live-stock cars hereinabove referred to—notified the River Road, under authority of an almost unanimous strike vote of said trainmen, that unless said disputes were settled before 10:30 P.M., January 23, 1946, River Road trainmen would go out on strike at that hour. Under continued threat of such a strike the River Road shortly before the hour set for said strike made an agreement with said Brotherhood which, among other things,

provided that said work of moving and switching livestock cars be given to River Road trainmen. Said stipulation further recited that J. L. McKee, Vice President of the River Road and of the Central, participated in the negotiations with the Brotherhood and signed the foregoing agreement as Vice President of said railroads (R. 55–56).

The Preliminary Injunction (R. 58–67)

On March 14, 1946 (R. 58), the court below made findings of fact and conclusions of law and entered a preliminary injunction, pending the further order of the court, enjoining the defendants, "their respective officers, agents, representatives, employees and successors, and all other persons in active concert and participation with them," from failing and neglecting to obey said order of May 16, 1922, with respect to the transportation of livestock other than hogs and sheep from said Union Stock Yards, and from violating Condition 3 of said order in the like respect, and commanding them to permit plaintiffs to move their said cars over the line of the River Road as had been the practice prior to February 1, 1946 (R. 65–66).

Thus the form and scope of the injunction followed substantially paragraph (d) of Rule 65 of the Rules of Civil Procedure for District Courts of the United States, which provides that an injunction "is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

The court held as a conclusion of law that the Commission's report and order of May 16, 1922, was and is valid and binding on the defendants, that the change in operating arrangements, as above outlined, brought about by the defendants on February 1, 1946, constituted a discontinuance of traffic and operating relationships existing on or prior to May 16, 1922, between

the Junction and the River Road on the one hand and the plaintiffs on the other hand, within the meaning of said order of May 16, 1922, and was and is a violation of said order and Condition 3 thereof, and that the defendants and each of them were responsible for such discontinuance and were and are parties to such violation and were and are participants in such disobedience. The court also held that the facts stipulated, as above set forth, relative to the dispute between the appellant and the River Road and the agreement between them settling the same, were irrelevant and immaterial (R. 65).

The court also ordered that the motion of the Junction to dismiss the suit as to it be continued until the final hearing (R. 67).

Appeal of Chicago Junction

While the matter is of no particular importance here, brief reference to the appeal of the Chicago Junction is probably not inappropriate, since it is referred to in appellants' brief (p. 11). On appeal to the Circuit Court of Appeals for the Seventh Circuit, the Junction contended that the court below lacked jurisdiction of the subject matter of the action in so far as it related to the Junction; that Condition 3 of the order of May 16, 1922, did not apply to the Junction; that the complaint failed to state a claim against the Junction upon which relief could be granted; and that the court should reverse the decree of the court below and order the suit dismissed as to it. The Circuit Court of Appeals held that the District Court had jurisdiction of the suit, but that inasmuch as, on the stipulation of facts and the court's findings of fact, the Junction had no control over and nothing to do with the acts complained of by the plaintiffs, the preliminary injunction should not have issued against it. It further held that it could not properly pass upon the Junction's motion to dismiss the case as to it until the court below had passed upon it, and that the court below did not err in withholding its decision on that motion until the final hear-

ing. *Baltimore & O. R. Co. v. Chicago Junction Ry. Co.*, 156 F. (2d) 357.

Motion of Appellant for Leave to File Special Appearance, Etc. (R. 67-72)

On March 18, 1946 (R. 67), the appellant, by motion, asked leave of court to appear specially and not generally for the purpose of moving the court to vacate the temporary injunction and to dismiss the suit for failure to join as parties defendant the yard employees of the River Road or the appellant as their representative, who were alleged to be indispensable parties. This motion was denied by order entered March 19, 1946 (R. 67).

Attached to the motion which appellant proposed to file if leave to appear specially were given, was an affidavit by William Bishop, Vice President of appellant, and Felix E. Kazmer, General Chairman of the appellant for the River Road (R. 69), in which it is alleged that the appellant, as a bargaining representative of the River Road, had entered into an agreement with the River Road "which is now and *has been in effect for several years last past*, [and] is entitled 'Rules and Rates of Pay of Yardmen, Chicago Switching District, The Chicago Memorandum of Agreement.'" (R. 70.) The affidavit quotes certain provisions of said Chicago Memorandum of Agreement, which it is alleged have the effect of giving all yard work on the River Road to its yardmen (R. 71), and then alleges that "sometime ago a controversy arose" between the River Road and its yardmen, with particular reference to the handling of certain yard work by employees of other railroads on the River Road's tracks (R. 71), and that on January 23, 1946, this controversy was settled by a written interpretation of said Agreement, which "settlement interpretation is that referred to in paragraph 15 of the Stipulation of Facts heretofore filed by the parties herein" (R. 71-72). The affidavit further alleges that "the complaint in the present proceeding seeks to nullify such settlement interpretation and to give such yard work" to other

railroads, and that "In the event the Chicago River and Indiana Railroad Company fails to give yard work to its yard employees in accordance with said Chicago Memorandum of Agreement and the settlement interpretation of January 23, 1946, such failure may result in claims by such employees against said railroad company for money damages and other relief." (R. 72.)

Answer of the River Road and the Central (R. 81-87)

On May 6, 1946 (R. 81), the River Road and the Central filed a sworn answer (R. 87) in which, among other things, they denied that they or either of them "have violated condition 3 or any other part of the report and order of the Interstate Commerce Commission of May 16, 1922," and denied "that Condition 3 * * * is applicable to or imposes any duty upon the defendant, River Road." (R. 84.)

The answer further alleges that the River Road yard trainmen, for the purposes of the Railway Labor Act (Title 45 U.S.C.A. Sec. 151, et seq.), are represented by the appellant; that prior to January 1946 appellant made demands, allegedly based on said Chicago Memorandum of Agreement, that the work connected with the switching and spotting of stock cars on the tracks of the River Road be performed exclusively by River Road employees, which demands the River Road denied were supported by said Agreement; that in January 1946 a strike ballot was submitted by appellant to trainmen employed by the River Road to vote for or against a strike if their alleged grievances, including their claim to do said work, were not satisfactorily settled; and that appellant subsequently informed the River Road that its trainmen had voted almost unanimously in favor of the strike. (R. 84–85.)

The answer further alleges (R. 85–86):

> "* * * By letter, dated January 21, 1946, William Bishop, a Vice President of said Brotherhood, advised the River

Road that a strike of its trainmen would commence at 10:30 P. M. on Wednesday, January 23, 1946, unless the River Road made settlement of the aforesaid grievances before that time. The River Road immediately sent such information to the Secretary of the National Mediation Board. On January 23, 1946, the River Road received a telegram from the Secretary of the National Mediation Board stating that the President of the United States had that day created an emergency board to investigate the disputes on the River Road with certain of its employees represented by the Brotherhood of Railroad Trainmen. Subsequently on January 23, 1946, the aforesaid William Bishop advised the River Road that the strike would proceed as planned notwithstanding the action of the President of the United States aforesaid."

The answer further alleges that on the evening of January 23, 1946, a conference was had between officials of the appellant and officers of the River Road during which said William Bishop stated that unless certain demands, including the demands with respect to the switching and spotting of cars on the tracks of the River Road, were met before 10:30 P. M. on said date, not only the trainmen employed by the River Road would strike, but employees of other railroads operating in Chicago would probably strike within 8 hours after such time. It is further alleged that appellant's "officials refused to settle their demands on any basis which would permit the River Road to allow crews of railroads other than the River Road to move live stock cars used for the loading of live stock (other than hogs and sheep) to the place of loading on the lines of the River Road and to move such cars away from such places after loading." (R. 86.)

The answer alleges that at approximately 9:50 P.M. on January 23, 1946, an agreement was entered into conceding appellant's demands, which agreement was made solely to prevent a threatened strike, and that as a result of the agreement the strike was called off by appellant a few minutes before it

was to begin (R. 86). A copy of said settlement agreement is attached to the answer as an exhibit (R. 88–90).

Appellant's Petition to Intervene (R. 90-98)

On May 20, 1946 (R. 90), appellant presented to the court below its petition to intervene. This appeal has been taken from the order of that court denying said petition, which was entered November 7, 1946 (R. 137). The petition alleges that appellant is the bargaining representative of the trainmen employed by the River Road and that the petition is made as such representative. It further alleges in substance that under a contract, said Chicago Memorandum of Agreement, made by the appellant with the River Road on behalf of the latter's trainmen, those trainmen are entitled to all the work performed by trainmen on the River Road lines, including the work that has heretofore been done by employees of the plaintiffs over the line of the River Road.

The petition does not allege definitely when said agreement was entered into, except that the contract "has been in effect for several years last past." (R. 90.) In the affidavit of Felix E. Kazmer, General Chairman of appellant for the River Road, attached to the pleading of the appellant accompanying its petition to intervene (R. 102), it is also alleged that the agreement "has been in effect for several years last past" and that "a true copy of this Agreement is attached hereto, marked 'Exhibit A' and made a part hereof." (R. 102.) The date of Exhibit A (R. 106–126), which is a printed pamphlet, is not shown, but inasmuch as page 2 thereof (R. 107) makes reference to rates of pay effective October 1, 1937, it is apparent the pamphlet could not long have antedated, and probably postdated October 1, 1937. Page 1 of the pamphlet (R. 106) lists the railroads who were parties to the agreement with the appellant set forth therein. The River Road is not listed as a party and obviously it was not a party when the pamphlet was

issued. The record does not show when it became a party to the agreement, but manifestly it was after October 1, 1937.

Particular attention is called to this matter because of the following statement in appellant's brief (p. 7):

> "The River Road trainmen base their claim to this work, first, on their original collective bargaining agreement signed December 20, 1919, (R. 118) providing that they shall handle all 'yard work' on their employer's line (R. 108–109) and second, on a 'settlement interpretation' of this agreement dated January 23, 1946, specifically providing that they shall handle the switching and spotting of all outbound stock car movements (R. 88).

The implication of this statement is that the agreement was signed by the River Road and the appellant on December 20, 1919, and that the alleged contract rights of the River Road trainmen under it originated at that time. However, neither the petition to intervene nor any affidavit of the Brotherhood officials filed in this suit states the date the agreement was entered into between appellant and the River Road. Just what railroads were parties to the agreement when it was originally signed in December 1919 does not appear, nor does it appear when any of the railroads shown to be parties to it on said Exhibit A became parties. But said Exhibit A conclusively proves that the River Road did not become a party to the agreement until on or after 1937, and the allegations of the petition to intervene and of the various affidavits filed by the Brotherhood officials to the effect that the agreement "has been in effect for several years last past" are manifestly made in view of this fact.

The petition to intervene further alleges that appellant on behalf of the River Road trainmen "for some time" protested to the River Road over the failure of the River Road to permit its trainmen to do the work heretofore done by employees of the plaintiffs over the lines of the River Road (R. 91) and that on January 23, 1946, the River Road made a settlement with the appellant to the effect that the River Road's trainmen should

do that work, which settlement took the form of a "written interpretation" of said agreement.

The petition asserted appellant had the right to intervene because (1) it was an indispensable party, and (2) because Rule 24 (a) of the Rules of Civil Procedure for the District Courts of the United States gave it such right (R. 93–94).

The right to intervene under Rule 24 (a) was claimed because (1) 49 U.S.C.A. Sec. 17 (11) gave appellant an unconditional right to intervene, and (2) representation of appellant's interest by the defendants was inadequate (R. 94). Representation of appellant's interest by the defendants was alleged to be inadequate because (1) plaintiffs sought to relieve defendants of their obligation under the settlement agreement and the interests of the plaintiffs and the defendants were common and adverse to the appellant (R. 94); (2) defendants did not oppose the intervention of the Commission in the suit, which intervention was alleged to be inappropriate for various specified reasons (R. 94–95); (3) defendants did not file an answer until May 6, 1946 (R. 95); (4) defendants called no witnesses in opposition to the application for a preliminary injunction but contented themselves with signing a stipulation of facts which was wholly inadequate to indicate to the court that the suit grew out of a labor dispute and that any action of the court must be in compliance with the laws relating to labor disputes (R. 95); (5) defendants did not invite the court's attention to 29 U.S.C.A. Secs. 51–53 (the Clayton Act), to 29 U.S.C.A. Secs. 101–115 (the Norris-LaGuardia Act), to certain decisions relating to injunctions in labor disputes and which it was alleged would require dismissal of the complaint, nor to 49 U.S.C.A. Sec. 5 (2) (f) (R. 95); (6) defendants allegedly made no formal objection to the preliminary injunction even though the findings of fact and conclusions of law constituted a decision of the case on the merits; (7) defendants had failed to take any action to force the plaintiffs to make the appellant a party.

The petition to intervene also alleged that appellant should be permitted to intervene under Rule 24 (b) of the Rules of Civil Procedure (R. 97) but this point was abandoned by appellant (R. 155).

Attached to the petition to intervene was a motion by appellant to vacate the preliminary injunction, to assess damages against the plaintiffs and for summary judgment, with reference to which the motion to intervene stated:

> "This pleading sets forth the present claim or defense for which intervention is sought." (R. 97.)

The so-called pleading accompanying the petition to intervene (R. 99–102) contained (1) a motion to vacate the preliminary injunction for failure (a) to make employees of the River Road or their representative a party to the suit, and (b) to comply with the provisions of the Norris-LaGuardia Act (29 U.S.C.A. Secs. 101–115) or the provisions of the Clayton Act (29 U.S.C.A. Secs. 51–53) relating to injunctions in labor disputes; (2) a motion to assess damages against the plaintiffs for the wrongful and improvident issuance of the injunction; and (3) a motion for summary judgment in favor of appellant (a) for lack of jurisdiction over the subject matter due to the failure to join River Road employees or their representative, alleged to be indispensable parties, and (b) for failure to state a claim upon which relief could be granted because the complaint did not satisfy the requirements of the Norris-LaGuardia Act or the Clayton Act, did not allege a violation of the order of the Commission or, if it did, the court should not enjoin violation of the order, because the Commission did not have jurisdiction to enter the same, 49 U.S.C.A. Sec. 5 (2). (f) was applicable, and the public interest required that no injunction be issued.

After the court had denied its petition to intervene, appellant filed a motion to amend said petition by adding thereto the allegation that 28 U.S.C.A. Section 45a gave it an unconditional right to intervene (R. 138–140). This motion was denied (R. 138).

QUESTION PRESENTED BY THE APPEAL

The question presented by this appeal is whether appellant by its petition to intervene and the accompanying motion has alleged facts which entitle it to intervene as a matter of right. Appellant contends that it is entitled to intervene as a matter of right because (1) it is an indispensable party, (2) two federal statutes give it an unconditional right to intervene within the meaning of Rule 24 (a) (1) of the Rules of Civil Procedure, and (3) Rule 24 (a) (2) of said rules gives it such right.

As will presently be demonstrated, appellant's claim that it is entitled to intervene as of right because it is an indispensable party is wholly without foundation. In order to prevail on this appeal appellant must establish the proposition that it has shown such an interest in the issue raised by the suit that the court ought not to proceed without allowing it to become a party. To answer that, resort must be had to Rule 24 (a) (1) and (2) of the Rules of Civil Procedure which is as follows:

> "Rule 24. Intervention.
>
> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

Accordingly the questions to be answered are (1) do either of the two United States statutes referred to by appellant give it an unconditional right to intervene, or (2) would or might appellant be bound by a judgment in this cause and (if so) is or might the representation of appellant's interest by existing parties be inadequate.

SUMMARY OF ARGUMENT

I.

Appellant's claim that it is entitled to intervene because it is an indispensable party is wholly without foundation. An indispensable party is one without whom the court cannot proceed. The absence of an indispensable party is an objection taken only by a party defendant or the court on its own motion. An indispensable party is not concerned with a suit to which he is not a party. The subject of indispensable parties and the subject of intervention raise totally different problems and should not be confused.

II.

All intervention is founded on interest. Rule 24 (a) (2) of the Rules of Civil Procedure providing for intervention as of right in certain cases presupposes a direct interest in the suit and that intervention is necessary for the protection of such interest. The interest must be that created by a claim to the demand or some part thereof in suit, or a lien upon the property or some part thereof in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation.

III.

Appellant has shown no such interest as entitles it to intervene as of right because its claim is based upon an alleged contract with the River Road which is necessarily subordinate to the order of the Commission and the rights of the plaintiffs and the public to have such order enforced. That order was entered primarily in the public interest and in a matter over which Congress has given the Commission exclusive jurisdiction. The order was entered and decreed to be valid and binding upon all the plaintiffs and all the defendants herein long before the alleged contract between the appellant and the River Road came into existence and any rights created by that contract are ne-

cessarily subordinate to rights created by the order. Even had the contract antedated the order, the order must nevertheless prevail because the constitutional power of Congress to regulate interstate commerce may not be hampered or restricted by prior contracts between private parties.

IV.

Appellant's petition to intervene with its accompanying motion to dissolve the preliminary injunction, assess damages against the plaintiffs and dismiss the suit amounts in substance to a collateral attack upon the order of the Commission which will not be permitted.

V.

If appellant as a representative of the River Road trainmen has a legitimate ground for complaint against the order it has available to it both a judicial and an administrative remedy. It may sue in a court of three judges under 28 U.S.C.A. Section 47 to set aside the order or it may apply to the Commission to reopen the proceedings in which the order was made and modify it.

VI.

Neither the petition to intervene nor the accompanying pleadings allege facts which show that the River Road trainmen will sustain any loss as a result of the enforcement of the operating rights of plaintiffs over the railroad of the River Road. On the contrary they show that those trainmen have an adequate remedy against the River Road for any loss which they may sustain through the enforcement of the order, which remedy will not be affected by any decree in this suit.

VII.

If it be assumed, *arguendo*, that appellant has a valid contract with the River Road, such fact would not entitle it to in-

tervene even though the incidental effect of a decree enforcing the order of the Commission would prevent the River Road from specifically performing its alleged contract with the appellant. Such decree would not deprive the River Road trainmen of any rights which they might have against the River Road for breach of their alleged contract. Neither the meaning nor the validity of that contract is in issue. Appellant has cited no authority holding that if A sues to enforce an obligation of B, parties holding contracts with B, the performance of which by B might be impaired by a judgment in favor of A, have any right to intervene in such action. On the other hand, this and other federal courts have squarely held that in such a situation parties holding contracts with B may not intervene.

VIII.

The mere fact that injunctive relief was asked and granted against the employees of the River Road does not establish that they have an interest in the suit. The injunction runs against such employees solely for the purpose of preventing the River Road from doing through them as its agents the things the River Road itself is enjoined from doing. The right of a court to enjoin the agents and employees of a party without such agents and employees being made parties to the suit is elementary law fully recognized by Rule 65 (d) of the Rules of Civil Procedure and the decisions of this and other federal courts.

IX.

If appellant has any interest in this suit which would otherwise entitle it to intervene as of right, such interest is being adequately represented by the defendants. The alleged failure of the defendants to call the Norris-LaGuardia Act to the attention of the court does not show that appellant's interests are not being adequately represented by the defendants. The Norris-LaGuardia Act has no application to this suit because (1) the suit does not involve and did not grow out of a labor dis-

pute, (2) a fundamental rule of statutory construction forbids the application of that Act to this suit, and (3) the Act is not applicable to the United States which, acting through the Interstate Commerce Commission, is asking for the enforcement of the order.

Section 5 (2) (f) of the Interstate Commerce Act has no application to any issue in this suit and the alleged failure of the defendants to call it to the attention of the court does not indicate that their defense to the suit will be inadequate. Defendants' answer has raised all possible defenses to the suit on the merits. Appellant's suggestions as to matters involved in a defense of the suit on the merits are frivolous and were not made in the court below.

X.

No statute of the United States gives the appellant an unconditional right to intervene. Section 17 (11) of Part I of the Interstate Commerce Act is not applicable because it refers exclusively to proceedings before the Commission. In addition it requires a showing of interest. The applicability of 28 U.S.C.A. Section 45a is doubtful, and it also requires that an interest be made to appear.

ARGUMENT

I.

APPELLANT'S CLAIM THAT IT IS ENTITLED TO INTERVENE BECAUSE IT IS AN INDISPENSABLE PARTY IS CLEARLY UNTENABLE.

Appellant cites a number of cases (Br. p. 18) which discuss the question of who is an indispensable party. But in each of

those cases the question of whether an indispensable party had not been made a party was raised by those who were already parties to the suit and not by someone seeking to intervene on the ground that he was indispensable. In *Shields* v. *Barrow*, 58 U. S. 129, which is perhaps the leading case on the question, this Court, referring to indispensable parties, said (p. 144):

> "* * * If the interest of the defendant requires their presence, he takes the objection of nonjoinder, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the court finds that an indispensable party is not on the records, it refuses to proceed. These remedies cover the whole subject, * * *."

Thus, as stated by this Court, a defendant may raise the question that his interest requires the presence of other parties who are indispensable and the complainant is forced to amend his bill and bring them in or the bill is dismissed. Or the court at the hearing may find that an indispensable party is not a party and refuse to proceed without such party. These remedies cover the whole subject of indispensable parties.

Obviously this is so since the very idea of an indispensable party is one without the presence of which the court cannot proceed. Manifestly an indispensable party need not be concerned with the suit since the court will not proceed without him. These considerations explain why appellant is unable to cite any case where a party has been permitted to intervene upon the ground that he is indispensable.

The question of who is entitled to intervene in a suit relates to a totally different problem and should not be confused with the question of who is indispensable. This is shown by the fact that the Rules of Civil Procedure dealing with the question of intervention make no reference to the subject of indispensability.

II.

IN ORDER TO BE ENTITLED TO INTERVENE AS OF RIGHT, PETITIONER MUST SHOW A DIRECT INTEREST IN THE LITIGATION AND THAT INTERVENTION IS NECESSARY FOR THE PROTECTION THEREOF.

It is well established that Rule 24 (a) of the Federal Rules of Civil Procedure giving an absolute right to intervene in certain cases presupposes a direct interest in the issues. As the courts and text writers have consistently pointed out, this was the case when intervention was governed by former Equity Rule 37, and Rule 24 (a) merely continues in effect Rule 37.

In *Pipe Line Co.* v. *U.S.*, 312 U.S. 502, this Court, in an opinion by Mr. Justice Frankfurter, at page 508, characterized Rule 24 (a) as containing "the *codification* of general doctrines of intervention." That Rule 24 (a) embodies or is to be interpreted in the light of former general principles of intervention is clearly indicated by the following statement from the opinion of this Court by Mr. Justice Roberts in *Vinson* v. *Washington Gas Co.*, 321 U.S. 489 (p. 498):

> "* * * One of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding."

In 6 Cyclopedia of Federal Procedure (2nd Edition) it is said (p. 477):

> "It is altogether in order to emphasize at the outset, before undertaking a more detailed analysis of Rule 24(a), that *it introduces no innovation, in so far as the absolute right to intervention under certain circumstances is concerned.*"

And discussing the right to intervention under Equity Rule 37, it is said (p. 479):

> "Such right of intervention was absolute where the petitioner *had direct interest* in the litigation and subject-mat-

ter thereof and such intervention was necessary for its protection."

It is further said (p. 480):

"In alluding to the matter of 'interest' in connection with intervention, one's conclusions should be prefaced by the observation that, historically and otherwise, all intervention is grounded in 'interest.' It has been said most appropriately that the requirement that there be an 'interest' merely reflects the 'orthodox prerequisite to judicial aid in any sort of proceeding: the establishment of an injury for which the law will give relief.' "

and again (p. 482):

"Although Rule 24 does not say so in terms, it goes without saying that it presupposes in one intervening a direct interest in the case at bar. Rule 24(a) (2) refers to the representation of the applicant's 'interest' by 'existing parties,' and Rule 24(a) (3) assumes the possibility of being adversely affected by a distribution or other disposition of property in the court's custody. In the last analysis this is nothing more than a continuation of a basic general rule of intervention, and in view of the fact that Rule 24 *merely amplifies and states the pre-existing federal practice at law and in equity*, it is essential to give consideration to general authorities dealing with *this basic element of intervention*."

In *Babcock* v. *Town of Erlanger*, 34 F. Supp. 293 (Dist. Ct., E.D., Ky.), the court, referring to Rule 24 (a), said (p. 295):

"This rule amplifies and *restates* both at law and in equity the federal practice at the time of its adoption. Washington Institute on Federal Rules, page 67.

"The cases prior to the adoption of the rule are therefore in point on this question."

To the same effect is *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers of America*, 7 Fed. Rules Serv. 460 (Dist. Ct., W.D. Va.).

In *Smith* v. *Gale*, 144 U.S. 509, this Court said (p. 518):

> "To authorize an intervention, therefore, *the interest must be that created by a claim to the demand or some part thereof in suit, or lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation.*"

We shall now show that appellant has wholly failed to state facts which establish such an interest as is necessary to permit it to intervene as of right.

III.

APPELLANT HAS NO SUCH INTEREST AS ENTITLES IT TO INTERVENE AS OF RIGHT FOR THE REASON THAT ITS CLAIM IS BASED UPON AN ALLEGED CONTRACT WITH THE RIVER ROAD WHICH IS NECESSARILY SUBORDINATE TO THE ORDER OF THE COMMISSION.

A.

The River Road could not through a purported contract with Appellant create any rights in its trainmen which would nullify or render unenforceable the antecedent order of the Commission.

As pointed out, *supra*, page 14, the River Road did not become a party to the Chicago Memorandum of Agreement, which formed the original basis of appellant's claim and which was "interpreted" by the settlement agreement between appellant and the River Road entered into on January 23, 1946, until 1937 or after, or at least fifteen years after the Commission's order of May 16, 1922.

Not only did the order of May 16, 1922, long antedate any alleged agreement between appellant and the River Road but the order was adjudicated valid and binding on the River Road long before the River Road became a party to any agreement

with the appellant. It is alleged in the sworn complaint of the plaintiffs herein (R. 5, 6, 12), stated as a fact in the stipulation of facts entered into by the plaintiffs, the Commission and the defendants (R. 54), found by the court below as a fact (R. 61–62), and nowhere questioned by the appellant in its motion to intervene or other documents filed by it in the court below or in its brief in this Court, that on January 15, 1929, the District court of the United States for the Northern District of Illinois, Eastern Division, in a proceeding entitled *The Baltimore & Ohio Railroad Company, et al.* v. *United States of America, et al.*, In Equity No. 3427, to which proceeding all of the plaintiffs herein, or their respective predecessors in interest, and all of the defendants herein were parties, entered a final decree, by which that court found and decreed with respect to said order of May 16, 1922, as follows (R. 46):

> "* * * and the court having heard arguments of counsel with reference to the matter, finds and decrees that the original order of the Interstate Commerce Commission, approving the execution of said lease as modified by its supplemental decision and order of December 3, 1928, is valid and binding upon all of the parties."

As a part of its records, the court below will take judicial notice of said decree, *United States* v. *Pink*, 315 U.S. 203, 216, and in reviewing the action of the court below, this Court will likewise take judicial notice thereof. *United States* v. *Pink*, *supra*, page 221; *Adam* v. *Saenger*, 303 U.S. 59, 63; *Hanley* v. *Donoghue*, 116 U.S. 1, 16.

Thus any question as to the validity of the order is by reason of said final decree of January 15, 1929, *res judicata* as to the River Road and its privies, including appellant, whose claim is based upon a subsequent contract with the River Road. *Johnson Co.* v. *Wharton*, 152 U.S. 252, 257; *Cromwell* v. *County of Sac*, 94 U.S. 351, 352.

The duties imposed by Condition 3 of the Commission's order are duties imposed not only for the benefit of the plain-

tiffs but in the public interest, pursuant to the authority granted the Commission under the Interstate Commerce Act. The order of the Commission which authorized the Central to acquire all the stock of the River Road, and the River Road to acquire by lease the properties of the Junction, was issued pursuant to paragraph (2) of Section 5 of the Interstate Commerce Act, which at the time of the entry of the order provided (49 U.S.C.A. Sec. 5 (2)):

> "Acquisition of control of one carrier by another. Whenever the commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this chapter, that the acquisition, to the extent indicated by the commission, by one of such carriers of the control of any other such carrier or carriers either *under a lease or by the purchase of stock* or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, *will be in the public interest*, the commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and *on such terms and conditions* as shall be found by the commission to be just and reasonable in the premises."

In *N.Y. Central Securities Co.* v. *United States*, 287 U.S. 12, this Court sustained the constitutionality of the above provision and upheld an order of the Commission authorizing the lease by the New York Central Railroad Company of the railroad systems of the Big Four and Michigan Central companies. Speaking of the criterion by which the Commission was to be guided in the exercise of the authority conferred upon it by section 5 (2), this Court said (p. 24):

> "* * * *That criterion is the 'public interest.'* It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context in the provision in question show the contrary. Going forward from a policy mainly directed to the

prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in *New England Divisions Case*, 261 U.S. 184, 189, 190, adverted to that purpose, which was found to be expressed in unequivocal language; 'to attain it, new rights, new obligations, new machinery, were created.' The Court directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to 'the transportation needs of the public,' 'the necessity of enlarging transportation facilities,' and the measures which would *'best promote the service in the interest of the public and the commerce of the people.'* Id. p. 189, note. See, also, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266, 277. The provisions now before us were among the additions made by Transportation Act, 1920, and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to *adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities*, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred."

In *Texas* v. *United States*, 292 U.S. 522, this Court, in speaking of the policy of the Act, said (p. 530):

"* * * It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the *maintenance of service, is viewed as a direct concern of the public. Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 317; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277. The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24, 25. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—*is that of the controlling public interest.* And that term as used in the

> statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.'"

Prior to enumerating the conditions in its report, the Commission said with reference to them (R. 22):

> "* * * others suggest themselves from the standpoint of an administrative body, as necessary in order to *safeguard the public interest* in the future."

After enumerating the conditions, the report of the Commission continued (R. 25):

> "*Subject to the observance of the above conditions*, we find that the acquisition by the Central of the capital stock of the River Road and the *leasing to the River Road of the properties (owned and leased) of the Junction will be in the public interest.*"

The obligations imposed on the defendants by Condition 3 of the order were thus unquestionably obligations imposed by the Commission in the public interest.

Obligations imposed by the Commission in the public interest may not be terminated by a court. It was squarely so decided in *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134. This Court there held that, in a reorganization proceeding under Section 77 of the Bankruptcy Act, the question of whether a trackage agreement between the bankrupt and another railroad company should be continued or terminated should not be decided by the court but should be left to the discretion of the Commission. This Court said (p. 143):

> "The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be allowed. These matters involve not

only the interests of the two parties to the trackage agreement but *phases of the public interest as well. A court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted.*"

Referring to the Interstate Commerce Act, this Court further said (p. 147):

> "But Section 5 (2) (a) vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. *The jurisdiction of the Commission is exclusive.* * * * It is the function *of the Commission* to determine the terms and conditions under which trackage rights are acquired."

The operating rights of the plaintiffs over the line of the River Road are in substance trackage rights. The continuation of those rights and the terms and conditions upon which they are to be exercised are subjects left to the determination of the Commission. Even a court has no authority to interfere with the prerogatives of the Commission in such matters. Manifestly the River Road could not by any contract which it might execute create rights in itself or in its employees which would interfere with the exercise by the plaintiffs of rights theretofore conferred upon them by the order of the Commission.

Appellant apparently contends (Br. p. 35) that Section 5 (2) (f) of the Interstate Commerce Act affords some justification for the alleged contract between it and the River Road, which is so clearly in direct conflict with the order of the Commission. That section, which was added to the Act in 1940, some eighteen years after the Commission's order here involved, provides as follows 49 U. S. C. A., Sec. 5 (2) (f):

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.

> In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter, and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

It is inconceivable that Congress by this provision intended to permit carriers to nullify, through the medium of collective bargaining agreements, conditions attached to prior orders of the Commission, and a brief examination of the section shows that it has no such effect. It directs the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected" when approving a merger, consolidation, lease, etc. This protection is to assure such employees that for a maximum period of four years they will not be in a worse position with respect to their employment than before. But such a provision in a Commission order, unless qualified, would be an invasion of the field normally covered by collective bargaining agreements between the carriers and the authorized representatives of their employees. The last sentence of the paragraph was therefore necessary to forestall the argument that, once the Commission had acted, there was no room for collective bargaining. The Commission has so applied the section. In prescribing conditions under this paragraph, it has left certain matters to be settled through collective bargaining negotiations. *Texas & P. Ry. Co. Operation*, 247 I. C. C. 285, 296–297.

But, in any event, the language of the last sentence of the paragraph makes it inapplicable to the instant case. The term "said employees" refers to those employees adversely affected in their employment status by action taken under a Commission order entered pursuant to Section 5 (2). Neither the employees of the River Road nor of the Central were affected, adversely or otherwise, by the imposition of Condition 3 of the Commission's order. In fact, in providing that *"the present traffic and operating relationships * * * shall be continued"* the direct effect of that condition was to preserve the status quo of those employees, as well as of the employees of the trunk line carriers connecting with the River Road.

Appellant apparently relies upon the case of *Gulf, M. & N. Co.* v. *Ill. Cent. R. Co.*, 21 F. Supp. 282 (D. C. Tenn., 1937) as in some way sustaining the validity of its alleged contract (Br. p. 31). That case was a suit by the G. M. & N. R. R. against the Illinois Central to restrain the latter from interfering with the former's operation of its freight trains over the Illinois Central tracks with its own engines and crews. This operation was conducted by the G. M. & N. under a trackage contract entered into pursuant to a certificate of convenience issued by the Commission. This contract provided for the operation of its trains by the G. M. &. N. with its own engines and crews, but the Commission's report accompanying its certificate did not discuss this feature and the certificate itself was silent on the matter. The occasion for the suit was a threatened strike by Illinois Central employees in protest against the operation of the G. M. & N. trains by G. M. &. N. crews.

It appeared at the trial that, *prior* to the issuance of the Commission's certificate, there had been an understanding and agreement between the Illinois Central and its employees that they would operate all trains over its tracks. While the suit was pending the Illinois Central offered to reimburse the G. M. & N. for the additional expense to it of having Illinois Central crews operate its trains.

The court refused to specifically enforce the trackage contract between the roads so far as use of G. M. & N. crews was concerned, stating in a *dictum* that if the Commission's order had authorized the operation to be conducted by G. M. & N. crews it would have exceeded the Commission's power for the reason that it has no jurisdiction over labor controversies.

There are a number of controlling distinctions between that decision and the case at bar. There the agreement giving the Illinois Central crews the right to the work preceded the Commission's order, whereas here the order preceded the alleged agreement by many years. There the order of the Commission was permissive, whereas here the conditions which came into force upon making the lease pursuant to the order were mandatory. There the order made no reference to the use of crews, whereas here all operating arrangements, including particularly the method of handling the cars here in question, were required to be continued in effect. There the agreement entered into pursuant to the Commission's certificate changed operating arrangements, whereas here the Commission's order specifically continued them in effect without change. There the question of the validity of the Commission's order was in issue, whereas here the validity of the order is *res judicata*.

It is therefore unnecessary to consider whether the decision was correct, as it has no application whatever to the instant case. However, it should perhaps be noted that the *dictum* with respect to the Commission's jurisdiction is obviously unsound, inasmuch as this Court specifically held in *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 147, that "the jurisdiction of the Commission is exclusive" with respect to "the power to determine the terms and conditions under which trackage rights may be acquired."

For all of the foregoing reasons the alleged agreement between appellant and the River Road could not and did not create any rights in the River Road trainmen to perform the

work of operating plaintiffs' cars over the line of the River Road which the Commission's antecedent order required the River Road to permit the plaintiffs to continue to perform. Since appellant's motion to intervene is based entirely on its alleged contract with the River Road, it must fail.

B.

Had Appellant's Alleged Contract with the River Road Antedated the Order of the Commission, the Order Must Nevertheless Prevail.

As previously pointed out, the appellant has failed to allege by any pleading filed in the case the existence of any contract with the River Road which antedated the order of the Commission. Furthermore, although the court below, from the very beginning of appellant's attempt to participate in the suit and long before its motion to intervene was filed, and after said motion was filed, repeatedly made the point that appellant's alleged contract could not affect a previous order of the Commission (R. 76, 78, 79, 134, 135 and 136), the appellant never at any time claimed in that court that it had any contract with the River Road which antedated the Commission's order. Such claim was made for the first time in this Court. It is made here by implication on page 7 of appellant's brief wherein it is stated that the claim is based on the trainmen's alleged collective bargaining agreement signed December 20, 1919, "providing that they shall handle all 'yard work' on their employer's line (R. 108–109)" and on a "settlement interpretation" to that agreement dated January 23, 1946.

Assuming that the River Road became a party to the agreement on December 20, 1919, that agreement did not provide that its trainmen should handle all the "yard work" on its line. It simply defined "yard work" and provided that it should be done by yardmen (R. 108). The most that can possibly be implied from the agreement, to which a number of railroad

companies, including several of the plaintiffs herein, were and are parties, is that the yardmen of a particular railroad shall do all the yard work that such railroad may have to do.

It is alleged in the sworn complaint of the plaintiffs (R. 3) and stipulated as a fact (R. 51) by the plaintiffs, the Commission and the defendants (to which stipulation the appellant has made no objection) that on May 16, 1922, the date of the Commission's order, and for many years prior thereto, the plaintiffs had been doing with their own power and crews the work which appellant claims was the work of the River Road trainmen under the agreement of December 20, 1919. The order of the Commission directed that this practice should continue. Manifestly, if the River Road trainmen were given the right to do this work under the 1919 agreement they never asserted it and were not doing it when the order of May 16, 1922, was entered. When appellant first made claim to this work does not appear from any allegation in the pleadings filed by it, except that it is alleged in the motion to intervene (R. 91) and in the affidavit filed in support of the accompanying motion to dissolve the preliminary injunction, etc. (R. 104), that the trainmen "for some time protested" and then notified the River Road that if that claim and other disputes were not settled before 10:30 P. M. January 23, 1946, the trainmen would strike. In view of these facts it would seem reasonable to conclude that the agreement of 1919 had been in effect at least a quarter of a century before it occurred to the River Road trainmen to make the claim or protest which it later supported by the strike threat which in turn resulted in the so-called "settlement interpretation." These considerations demonstrate the exceedingly attenuated nature of the argument that the appellant's claim is based upon the agreement of 1919. It is so attenuated as to be frivolous.

But had the River Road been an original party to the 1919 agreement and had that agreement clearly conferred upon the River Road trainmen the right to do the work here claimed,

such agreement was clearly subordinate to the right of Congress to supersede it in the exercise of its regulatory power over interstate commerce.

Thus in *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, it was held that a contract made by a railroad for the issuance of annual passes to certain individuals in settlement of their claims for personal injuries against the railroad could not be specifically executed. The Court said (p. 482):

> "The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist."

That the Commission in entering the order here in question was exercising such regulatory power of Congress over interstate commerce and that its jurisdiction in that regard is exclusive, is placed beyond doubt by the decision of this Court in *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, discussed *supra* (p. 30), which also cites and follows the *Motley case* (p. 145). Thus if it should be assumed, in accordance with the implication of the statement in appellant's brief (which is wholly without support in the record) that the River Road became a party to the 1919 agreement prior to the date of the Commission's order, such fact could not avail it in this case because any such agreement was necessarily subordinate to the order of the Commission which plaintiffs are seeking to have enforced.

IV.

THE PETITION TO INTERVENE WITH THE ACCOMPANYING MOTION TO DISSOLVE THE INJUNCTION, ASSESS DAMAGES AGAINST THE PLAINTIFFS AND DISMISS THE SUIT, SHOWS THAT APPELLANT IS IN FACT ATTEMPTING A COLLATERAL ATTACK UPON THE ORDER OF THE COMMISSION, WHICH IS NOT PERMITTED.

Paragraph (c) of Rule 24 of the Rules of Civil Procedure, referring to a petition to intervene, states:

> "The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

As already pointed out (*supra*, p. 17), the only pleading accompanying appellant's motion to intervene was a motion to vacate the preliminary injunction, to assess damages against plaintiffs on account thereof and for summary judgment in favor of appellant. Unless the allegation that the complaint does not allege a violation of the order can be construed as an allegation that appellant's alleged contract is not in conflict with the order, then none of the numerous reasons assigned by appellant in support of its said motion is consistent with giving effect to the order, but each and all are reasons why the order should not be enforced. Fundamentally therefore the motion is an attack upon the order and an attempt to have the court nullify it through a refusal to enforce it.

Paragraph (12) of Section 16 of the Interstate Commerce Act (49 U. S. C. A. Sec. 16 (12)) pursuant to which this suit is brought provides:

> "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the en-

forcement of such order. If, after hearing, *such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise,* to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

Thus the only issue before the court in a suit to enforce an order of the Commission is whether the order was regularly entered and duly served (mere formal matters) and whether it has been violated. If the court so finds, the statute is mandatory; "the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise."

In such a proceeding the defendant may not question the validity of or otherwise attack the Commission's order. It was so held in *Interstate Commerce Com'n.* v. *Consolidated Freightways*, 41 F. Supp. 651 (Dist. Ct., D. N. Dak., S. D., 1941). That was an action by the Commission to restrain alleged unlawful operations by the defendant. The defendant had petitioned the commission for authority to operate as a common carrier by motor vehicle between certain points, pursuant to the so-called grandfather provisions of the Interstate Commerce Act pertaining to motor carriers. And the Commission had by order denied the petition. As a defense to the suit to enforce the order the defendant alleged various errors of the Commission in making it. The court held that these constituted an indirect attack upon the order and could not be availed of in such a suit. It said (p. 655):

"If the Commission errs in its application of the law to evidence received before it, legal machinery is provided for a test thereof in a direct proceeding. See 49 U.S.C.A. §17 (9); 28 U.S.C.A. §47.

"The contentions made by the defendant here amount to an indirect attack upon an order of the Commission,

which the defendant in this proceeding seeks to invalidate. Suits seeking to set aside orders of the Commission may only be tried under the Urgent Deficiencies Act, 28 U. S. C. A., Sec. 47. See *Powell et al.* v. *United States et al.*, 300 U. S. 276, 288, 57 S. Ct. 470, 81 L. Ed. 643.

> "There is no foundation or basis in the law for collateral attack upon an order of the Commission. Compare: *Board of Public Utility Commissioners of New Jersey* v. *United States et al.*, D. C. 21 F. Supp. 543, 547; *Powell et al.* v. *United States et al.*, *supra*, 300 U.S. page 288, 57 S. Ct. 470, 81 L. Ed. 643; *Venner* v. *Michigan Central Railroad Company*, 271 U.S. 127, 46 S. Ct. 444, 70 L. Ed. 868."

Thus the defendant was not permitted to defeat the enforcement of the order by reason of matters which constituted an attack on its validity. So in the instant case appellant should not be permitted to intervene for the purpose of attacking the validity of the order and so defeat its enforcement. The mere fact that appellant does not directly ask that the order be declared invalid does not establish that the purpose of the intervention is not an attack upon it.* Any position taken by appellant which would deny to the order its full and legitimate effect and the right to its enforcement is essentially an attack upon the order itself. Thus in *Venner* v. *Mich. Cent. R. R. Co*, 271 U.S. 127, this Court said (p. 130):

> "We agree with the court below that the suit is essentially one to annul or set aside the order of the Commission. While the amended bill does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, *which is equivalent to asking that the order be adjudged invalid and set aside.*"

Furthermore, as above pointed out (p. 27 *supra*), the order has by a final decree of a court of competent jurisdiction been

*Appellant does allege that the Commission did not have jurisdiction to issue the order (R.101).

held valid and binding upon the River Road and anyone claiming by, through or under it.

V.

IF APPELLANT CONSIDERS THAT THE TRAINMEN WHOM IT PURPORTS TO REPRESENT ARE AGGRIEVED BY THE ORDER OF THE COMMISSION, IT HAS MISTAKEN ITS REMEDY IN SEEKING TO INTERVENE IN THIS SUIT. IT SHOULD EITHER BRING AN ACTION UNDER 28 U.S.C.A. SECTION 47 TO SET ASIDE THE ORDER, OR APPLY TO THE COMMISSION FOR ITS MODIFICATION OR RESCISSION.

If appellant considers that the trainmen, whom it purports to represent, have any rights, not stemming from its contract with the River Road, which are invaded by the order, it may bring a suit under 28 U.S.C.A. Section 47 to set the order aside, to which suit the United States is an indispensable party. 28 U.S.C.A., Sec. 46, and cases cited next below. Congress has expressly provided that means by which aggrieved parties may attack Commission orders and no others are permitted. *Powell v. United States*, 300 U.S. 276, 288; *Lambert Co. v. Balt. & Ohio R. R. Co.*, 258 U.S. 377, 382; *North Dakota v. Chicago & N. W. Ry. Co.*, 257 U.S. 485, 489; *Ill. Cent. R. R. Co. v. Public Utilities Comm.*, 245 U.S. 493, 504.

Furthermore, the order itself leaves the door open for appellant, on behalf of the trainmen, to apply to the Commission for modification of any of the conditions of the order, provided it appears that the trainmen have an interest and that the public interest requires the modification sought. Condition 17 of the order provides (R. 34-35):

> "Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction is retained to reopen the proceeding on our own motion for the same purpose."

Thus if appellant, as a representative of the trainmen, has any legitimate ground for complaint against the order, it has available to it both a judicial and an administrative remedy. It may sue in court under 28 U.S.C.A. Section 47 to set aside the order or it may apply to the Commission to reopen the proceeding in which the order was made and modify it. Appellant should be remitted to a choice of those remedies and should not be allowed to enter this proceeding for the purpose of attacking the order collaterally.

VI.

NEITHER THE ALLEGATIONS OF THE PETITION TO INTERVENE NOR OF THE MOTION TO VACATE THE PRELIMINARY INJUNCTION, ETC., SHOW THAT RIVER ROAD TRAINMEN WILL SUSTAIN ANY LOSS AS A RESULT OF THE ENFORCEMENT OF THE OPERATING RIGHTS OF PLAINTIFFS OVER THE RAILROAD OF THE RIVER ROAD.

In addition to the fact that a contract in conflict with the order of the Commission can create no rights in the River Road trainmen, it should be noted that neither the petition to intervene nor the motion to vacate the preliminary injunction, etc., which appellant sought to file, states facts which show that any of the trainmen of the River Road on whose behalf the contract with that company is alleged to have been made would sustain any loss through enforcement of the order. The allegations of the petition to intervene are that, under appellant's contract with the River Road, the latter agreed that its trainmen should be permitted to do the work theretofore performed by plaintiffs' employees. In addition, the affidavit in support of the motion to vacate the preliminary injunction etc., referring to the employees of the River Road, including not only trainmen represented by appellant, but also engineers, firemen and enginemen, not represented by appellant, and who are not seeking to intervene, states (R. 105):

> "Such employees are losing work to which they are entitled and wages therefor believed to be in excess of $200 per day."

It is submitted that these allegations are entirely insufficient to show that the employees represented by appellant will sustain any loss through enforcement of plaintiffs' right to operate over the River Road. Their claim is one for special damages and it is well settled that the allegations in support of such a claim must be sufficient to show that damage necessarily resulted. *The Director*, 26 Fed. 708, 713; *Dissette* v. *Dost*, 280 Fed. 455, 456; *Gray* v. *Schoonmaker*, 30 F. Supp. 1019, 1023. The rule is not satisfied here. The allegation is made that the employees represented by appellant are being deprived of particular work that they are entitled to do, but it is not alleged that they are not now working full time and therefore could do the work in question if permitted to. This is a fatal defect in appellant's allegation of damage.

The affidavit in support of the proposed motion to vacate the preliminary injunction also alleges that the River Road employees (R. 105–106):

> " * * * are now filing time claims against said carrier arising out of such violation (of the alleged contract between appellant and the River Road) but have been paid nothing on account thereof, and, unless such claims are paid, further dissatisfaction will result among said employees."

It is not clear whether this is intended to be an allegation of damages suffered as a result of the injunction. It is entirely different from the theory of damage through deprivation of work above discussed. Whether it states a valid claim or not, it does not state one *against plaintiffs*. If the claims referred to are valid, the employees of the River Road may proceed *against that company*. But those claims will not be passed upon in this suit and the fact that they exist does not show the River Road employees will suffer a loss from enforcement of the Com-

mission's order in this suit. On the contrary, the affidavit indicates that if those employees have a valid contract with the River Road they have an adequate remedy against the River Road which can in no way be affected by any decree in this suit.

VII.

ASSUMING, ARGUENDO, THAT APPELLANT HAS A VALID CONTRACT WITH THE RIVER ROAD, SUCH FACT WOULD NOT ENTITLE IT TO INTERVENE.

If, for the purpose of argument, it be assumed appellant has alleged facts from which it can be said it has a valid contract with the River Road, the existence of such a contract would not entitle it to intervene.

The River Road trainmen have no direct interest in or claim to the obligation of the defendant companies embodied in the order of the Commission which this suit seeks to enforce. Even though the incidental effect of the decree might be to deprive them of the work which it is alleged the River Road has agreed they may do, nevertheless the decree would not deprive them of any rights which they might have against the River Road for breach of their alleged contract. Neither the meaning nor the validity of that contract is in issue.

The trainmen's interest in having the defendant companies free to perform their alleged contract with them is not such an interest as to permit them to intervene as a matter of right. This is established by the case of *United States* v. *California Canneries*, 279 U.S. 553. In that case, the Government filed a complaint against the Big Five meat packers, including Armour & Co., alleging violations of the anti-trust laws. On the same day the defendants filed their respective answers denying violations, and there were also filed stipulations for a consent decree which was entered in accordance with the stipulations. The decree enjoined the defendants from dealing in produce unrelated to the meat packing industry, including all kinds of fresh,

dried, canned and processed fruits and vegetables. By the decree the court retained jurisdiction of the cause for the awarding of further relief, enforcing the decree or entertaining applications with respect thereto. Subsequently the California Cooperative Canneries filed a petition for leave to intervene upon the ground that the decree prevented Armour & Co. from carrying out a contract with it for the purchase of large quantities of fruit which would result in very heavy losses to the petitioner. The contract contained a provision to the effect that in the event governmental action should materially interfere with its performance by Armour & Co., that company should have the right to terminate the contract without any liability to the California Canneries for any loss resulting therefrom. (See *California Co-Op. Canneries* v. *United States*, 299 Fed. 908, 910.)

The petition alleged that the decree was entered without any notice to the petitioner, or opportunity to be heard in opposition thereto, that as soon as petitioner had any knowledge thereof "it actively endeavored, in various ways and before various tribunals and officers, to secure a vacation or modification of the decree" in so far as it affected petitioner's rights (299 Fed. 911). The Supreme Court of the District of Columbia denied the petition, and petitioner appealed to the Court of Appeals of the District. That court reversed the decree of the court below and directed that petitioner be permitted to intervene. This action of the Court of Appeals was reviewed by this Court on certiorari and the judgment reversed. *United States* v. *California Canneries*, 279 U.S. 553. In reversing, this Court said (p. 556):

> "On April 29, 1922, the Canneries made a motion for leave to file an intervening petition. The petition accompanying the motion alleged that the consent decree interferes with the performance by Armour & Co. of a contract theretofore made with it, by which Armour agreed to buy large quantities of California canned fruit. The petition charged that the decree is void because the Supreme Court

of the District lacked jurisdiction; and it prayed that the decree be vacated. The Supreme Court denied leave to intervene. The Canneries appealed to the Court of Appeals. That court, so far as appears, did not consider the question whether, in view of the Expediting Act, it had jurisdiction on appeal. It *did not refer to the decisions which hold that an order denying leave to intervene is not appealable, In re Cutting*, 94 U.S. 15; *Credits Commutation Co.* v. *United States*, 177 U.S. 311; *Ex parte Leaf Tobacco Board of Trade*, 222 U.S. 578, 581; *In re Engelhard*, 231 U.S. 646; *City of New York* v. *Consolidated Gas Co.*, 253 U.S. 219; *New York* v. *New York Telephone Co.*, 261 U.S. 312, *except where he who seeks to intervene has a direct and immediate interest in a res which is the subject of the suit*, compare *French* v. *Gapen*, 105 U.S. 509, 524–526; *Smith* v. *Gale*, 144 U.S. 509; *Leary* v. *United States*, 224 U.S. 567; *Swift* v. *Black Panther Oil & Gas Co.*, 244 Fed. 20, 30."

It will be observed that the California Canneries had a very valuable contract to sell fruit to Armour & Co. which the decree rendered it impossible for Armour & Co. to perform. Not only was this so but the contract was so drawn as to absolve Armour & Co. from any liability for non-performance under the circumstances.

The interest of the trainmen, if any, in the present litigation is less direct and will be less affected than was the interest of the California Canneries which this Court held was not sufficient to entitle it to intervene as a matter of right. As above pointed out, while a decree for the plaintiffs in the instant case would prevent the River Road from performing its alleged contract with appellant, it would not operate to deprive the trainmen of a claim for any damages which they may be able to show as a result of a breach thereof if the contract is valid.

The case of *Babcock* v. *Town of Erlanger*, 34 F. Supp. 293 (Dist. Co., E.D. Ky.), is also rather closely analogous to the instant case. That was a suit by the buyer of water bonds against the town of Erlanger to cancel a contract for the purchase of the bonds and for recovery of moneys advanced by the

buyer upon the ground that the contract was procured through fraud and misrepresentation. The contractors employed by the city to build the water works system, who had partly performed their contract and who were to be paid from the proceeds of the bonds, sought to intervene. The court denied intervention, after quoting Rule 24 (a) and pointing out that cases of intervention decided prior to the adoption of the rule were in point. The court said (p. 295):

> "I am of the opinion that the proposed pleadings accompanying the motions to intervene do not meet the requirement. There is no privity of contract between the interveners and the complainants. *National Savings Bank* v. *Ward*, 100 U.S. 195, 25 L. Ed. 621. To so hold would be to bind complainants to the interveners with no obligation on the part of the interveners to the complainants. The right to intervene should not be a matter of speculation. The pleading accompanying the motion to intervene should set up the interest of the party just as in an original bill. *Rhinehart* v. *Victor Talking Machine Company*, D.C., 261 F. 646.
>
> "The position of the interveners is untenable. There is no *res* in court in which they have an interest. There is no right which they have which would be denied them by a judgment of this court whether in favor of the complainant or defendant. The fund sought to be recovered by the complainant is certainly not a fund in court over which there is litigation within the meaning or contemplation of the rule. This is a direct and simple proceeding to cancel a contract on the ground of fraud. The court is called upon to say 'yes' or 'no' to the prayer of the plaintiff's bill. If the court says 'yes' there was fraud, the money paid to the defendant must be returned. Certainly interveners cannot seriously contend that they would still have a claim upon this sum of money. *If the court says 'no' there was no fraud, then the contract is still in force and the interveners may proceed to enforce their rights against the defendant to collect for materials furnished or work done in accordance with this agreement with the defendant.*"

The court concluded as follows (p. 296):

> "There is no privity of contract. No element of trusteeship, no fund in court to which they could possibly lay claim, and no statutory enactment conferring upon them the right to intervene.
>
> "This is simply an action to cancel a contract, as I have heretofore said. Complainant is entitled to present the clear cut question of fraud in the procurement of a contract and the court should not permit the introduction of litigation having no relation to that opened by the original complaint. *Chandler & Price Co.* v. *Brandtjen & Kluge*, 296 U.S. 53, 59, 56 S. Ct. 6, 80 L. Ed. 39."

As stated by the court, the only question before it on the original complaint was whether the contract for the sale of the bonds should be canceled on account of fraud in its procurement. So in the instant case, the only question before the court on the complaint and the intervening complaint is whether the order of the Commission has been violated by the defendants. If such is the case, as above pointed out, paragraph (12) of Section 16 of the Interstate Commerce Act is mandatory to the effect that the order shall be enforced by an injunction. If it should be argued that appellant has a right to be heard on the question of whether the order of the Commission is violated, it could be argued with equal force that the contractors in the *Erlanger case* had a right to be heard on the question of whether there was fraud in the procurement of the contract to purchase the bonds. But that argument was rejected in the *Erlanger case* and by the same token it should be rejected here. There is no privity of contract between the plaintiffs and those whom the appellant claims to represent, just as there was no privity of contract between the buyers of the bonds and the contractors seeking to intervene in the *Erlanger case*.

As was well said by this Court in *Willard* v. *Tayloe*, 75 U. S. 557 (p. 571):

> "The owners of partial interests in contracts for land, acquired subsequent to their execution, are not necessary

parties to bills for their enforcement. *The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern.*

See also *Cella* v. *Brown*, 144 Fed. 742 (C. C. A. 8), to the same effect.

The case of *International Brotherhood* v. *Keystone Freight Lines*, 123 F. (2d) 326, relied on by appellant (Br. p. 21), has no application to this suit. In that case the plaintiff, a motor carrier, was engaged in a labor dispute with its own employees who were on strike. Connecting motor carriers who customarily interchanged freight with plaintiff were refusing to do so for the reason that their employees, who were members of the union that had called the strike against plaintiff, refused to handle such freight. Plaintiff sued to compel the connecting motor carriers, the union and its members who were employees of the latter, to interchange freight with it. The union was denied leave to intervene by the court below. On appeal it was held that the case was moot, but the Court of Appeals said in a *dictum* that the intervention should have been allowed below.

In that case the court's opinion that the union was the real party in interest is readily understandable. Primarily plaintiff's controversy was with its striking employees, represented by the union, and the purpose of plaintiff's suit was to defeat the strike by compelling the employees of the connecting carriers, also members of the union, to interchange freight with the plaintiff. Here there is no controversy between plaintiffs and their employees or the employees of the River Road. The only issue is whether the River Road itself shall continue to obey the order of the Commission, as it has been doing for 26 years, or shall now for the first time violate it. So far as plaintiffs and the Commission are concerned, appellant is an utter stranger to that controversy. Neither plaintiffs nor the Commission have any control over or are in any way concerned with the relations, contractual or otherwise, existing between the em-

ployees represented by appellant and the River Road. So far as plaintiffs and the Commission are concerned the real parties defendant are the carriers who have violated the order of the Commission, which both the plaintiffs and the Commission are entitled to have enforced. No rights of the employees represented by the appellant will be adjudicated.

The most that a decree in this suit could do would be to prevent the River Road from specifically performing its alleged contract with appellant. But appellant has cited no authority for the proposition that, if A sues to enforce an obligation of B to A, parties holding subsequent contracts with B, the performance of which by B might be impaired by a judgment in favor of A, have any right to intervene in such an action. If such a principle were admitted, the utmost confusion would result from the intervention of parties whose alleged interest might lie in having B found free from the asserted obligation.

Appellant's insistence that the trainmen it represents are the real parties defendant in interest in this suit borders on the frivolous. What is involved in this suit is the operating rights of plaintiffs over the line of the River Road, a switching line occupying a strategic position in the industrial heart of Chicago. Those rights are valuable to plaintiffs, as is evidenced by the fact that, if the order of the Commission is not enforced, the plaintiffs will have to pay $12.96 for each loaded car handled by the River Road for them for which they have been heretofore paying $1.00 per car, loaded or empty, for the right to handle over the River Road's lines with their own engines and crews. By like token those rights involve a burden upon the defendant carriers who, so long as those rights are exercised, cannot make what is obviously a highly profitable charge against the plaintiffs for handling plaintiffs' cars. Not only is this so, but failure to enforce the order would deprive the plaintiffs of direct access to the Chicago Union Stock Yards and thus prevent them from maintaining there (a point of origin of

much traffic) direct contact with shippers and render them powerless to see that adequate service is given such shippers, thus placing them at an obvious disadvantage with the Central, a competing trunk line, by which the River Road is wholly owned.

The competitive disadvantages which the order of the Commission here involved inflicted upon plaintiffs to the benefit of the Central is rather fully discussed by this Court in the *Chicago Junction Case*, 264 U. S. 258, 266–267. Condition 3 of the order was designed to alleviate the harm which would otherwise have been done plaintiffs by the order, which this Court in that case (p. 627) characterized as "injury inflicted by denying the plaintiffs equality of treatment."

The matter of who shall do the work of the trainmen involved in the movement of the cars in question is a very minor one, except as it involves in its consequences a change in the very important traffic and operating relations which have existed since before 1922 between the plaintiffs on the one hand and the defendants on the other. Appellant would have the diminutive tail of its trainmen's claim wag the whole dog. Its insistence that it is the real party defendant in interest has no more substance than would the insistence of a contractor who held an exclusive right to supply the River Road with coal that he was the real party in interest because the River Road would need less coal if it did not handle the cars in question. No one would seriously contend that such a contractor had an absolute right to intervene in this suit. Appellant has no greater right.

We believe that the foregoing authorities and considerations demonstrate that appellant has not shown such an interest in this suit as would entitle it to intervene as of right, even if such interest were not being adequately represented.

VIII.

THE MERE FACT THAT INJUNCTIVE RELIEF WAS ASKED AND GRANTED AGAINST THE EMPLOYEES OF THE RIVER ROAD DOES NOT ESTABLISH THAT THEY HAVE AN INTEREST IN THE SUIT.

Appellant asserts (Br. p. 21):

> "* * * The fact that direct injunctive relief is sought against the River Road employees is of itself sufficient proof that the interest of the Brotherhood, as their representative, is such that the Brotherhood is an indispensable party."

Of course this statement is utterly without foundation. Appellant is here confusing the subject of indispensable parties with the subject of intervention, which, as previously shown, are totally different subjects. It is elementary law, fully recognized by Rule 65 (d) of the Rules of Civil Procedure, that an injunction may issue against and be binding on the agents and employees of a party without their being made parties to the suit, because to hold otherwise would enable a defendant to nullify the decree by carrying out the prohibited acts through its agents, servants or employees, or those identified with it. *Chase National Bank* v. *Norwalk*, 291 U. S. 431, 436, 440; *In re Lennon*, 166 U. S. 548, 554.

Thus in *Dadirrian* v. *Gullian*, 79 Fed. 784 (Circuit Ct. N. J.), the court said (p. 786):

> "* * * The writ is directed specifically to the defendants in the suit, and then generally, without naming them, to their servants, agents, and employes. The object of this generalization is to prevent the defendants from doing by others that which the court has forbidden them to do personally; from accomplishing indirectly a result prohibited by the court. The full effect of the order is that the defendant shall not do the unlawful act himself, neither shall his agent, servant, or employé do it for him, nor shall

the defendant do it as the agent, servant, or employe of another. Potter v. Muller, 1 Bond, 601, Fed. Cas. No. 11,333. There is no restraint laid upon the agent, servant, or employe personally, but merely as the agent, servant, or employe of the enjoined defendant. Slater v. Merritt, 75 N. Y. 268; Wellesley v. Mornington, 11 Beav. 181. Notwithstanding the injunction and notice of it, he upon ceasing to be the agent, servant, or employe of the defendant, is free to act for himself in the protection of his own rights and the prosecution of his own interests, even though it involve his doing the very thing prohibited his former master. Mexican Ore Co. v. Mexican Guadalupe Mining Co., 47 Fed. 356. He may avoid obedience to a mandatory injunction by actually ceasing to be an employe of the company (Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 743); and he may enter the service of another master a stranger to the suit, and be as free as he from obligation to obey the court's decree (People v. Randall, 73 N. Y. 416; Slater v. Merritt, 75 N. Y. 268)."

Thus there can be no doubt that the agents and employees of the River Road, including the trainmen represented by appellant, in their capacity of such agents and employees, are and so long as they remain in such capacity will be bound by the preliminary injunction issued in this case and will also be so bound by any like permanent injunction which may be issued, and it is wholly unnecessary to make them or their representatives parties to the suit in order to so bind them.

Whether appellant is entitled to intervene as of right depends solely upon whether it has alleged in its pleadings facts sufficient to establish such right under Rule 24 (a) (1) and (2) of the Rules of Civil Procedure. Whether the facts alleged are sufficient for that purpose depends upon the extent of the interest, if any, which appellant has shown it has in the issue raised by this suit, and the purposes for which intervention is sought. The mere fact that the injunction runs against the employees of the River Road as its agents in no manner tends to establish that they have an interest in the suit. The injunction runs

against them solely for the purpose of preventing the River Road from doing through them as its agents the things the River Road itself is enjoined from doing.

IX.

IF APPELLANT HAS ANY INTEREST IN THIS SUIT, WHICH PLAINTIFFS DENY, IT IS BEING ADEQUATELY REPRESENTED BY THE DEFENDANTS.

Appellant contends (Br. pp. 27–35) that it is entitled to intervene as a matter of right because its interests are not being adequately represented by the defendants, particularly the River Road. Since, as above demonstrated, the trainmen do not have any interest in the controversy which entitles them to intervene as a matter of right, the contention that such interests are not being adequately represented necessarily comes to naught. However, we will consider the alleged failure of the defendants to call the attention of the Court to the Norris-LaGuardia Act and certain decisions in connection therewith, and to Section 5 (2) (f) of the Interstate Commerce Act, together with certain of appellant's suggestions relative to the defense of the case on its merits, as bearing on the alleged inadequacy of the defendants' defense to the suit.

A.

The contention that the Norris-LaGuardia Act prohibits the court from enforcing the order of the Commission is frivolous.

The Norris-LaGuardia Act provides that no court of the United States shall have jurisdiction to issue any injunction "in a case involving or growing out of a labor dispute" except in conformity with the Act, and that no injunction shall "be issued contrary to the public policy declared" in the Act. 29 U.S.C.A. Section 101.

(1) THIS SUIT DOES NOT INVOLVE AND DID NOT GROW OUT OF A LABOR DISPUTE.

This suit grows out of the refusal of the defendants to obey the order of the Commission requiring them to continue the right of the plaintiffs to operate their cars to and from the Union Stock Yards over the line of the defendant River Road. Under the specific provisions of paragraph (12) of Section 16 of the Interstate Commerce Act the failure of the defendants to obey that order gave rise to the cause of action which plaintiffs have stated in their complaint in this suit. Furthermore, upon proof of the breach of that order, the court is commanded to issue an injunction enforcing it. The duty to obey the order is absolute unless and until it is set aside by a court of competent jurisdiction or is vacated or modified by the Commission itself. Neither the plaintiffs nor the court are in any way concerned with the considerations which might have influenced the defendants to commit a breach of the order. Such factors have no bearing on the plaintiffs' right to maintain this suit and are not pertinent to any issue presented by it. The suit therefore does not involve and did not grow out of a labor dispute. It involves and grows out of a violation of the Commission's order.

(2) A FUNDAMENTAL RULE OF STATUTORY CONSTRUCTION FORBIDS THE APPLICATION OF THE NORRIS-LaGUARDIA ACT TO THIS SUIT.

The Norris-LaGuardia Act (29 U.S.C.A. Secs. 101–115) was enacted March 23, 1932. It is broad in its scope and deals with situations having an almost infinite variety of aspects and arising anywhere in the field of labor relations.

Paragraph (12) of Section 16 of the Interstate Commerce Act, under which plaintiffs brought this suit, has been twice amended and as so amended reenacted since the passage of the Norris-LaGuardia Act. It was amended on April 9, 1935 (c. 498, Sec. 1, 49 Stat. 543) and again on September 18, 1940 (c. 722, Title I, Sec. 11(a), (b) 54 Stat. 912, 913). As so last amended and reenacted it provides (49 U.S.C.A. Sec. 16 (12)):

> "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while

> the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

This section deals with a very limited field and is definite and specific in its requirements. An order of the Commission duly made and valid, as the order in this case has been decreed to be, has the force and effect of law. Paragraph (12) is definite, specific and mandatory in its direction as to how such order shall be enforced.

It is a fundamental rule of statutory construction that statutes dealing with special and restricted subject matters are not affected by statutes of broad and general application unless they are specifically mentioned therein.

In *Virginian Ry. Co.* v. *Federation*, 300 U.S. 515, the court had issued an injunction which, among other things, commanded the railway company to treat with the representatives of its employees, a duty imposed upon it by Sec. 2, Ninth, of the Railway Labor Act (45 U.S.C.A. Sec. 152, Ninth). To the objection that the Norris-LaGuardia Act had not been complied with, this Court, speaking through Mr. Justice Stone, said (p. 563):

> "It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of §2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. *Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-*

LaGuardia Act. See the *Railway Clerks* case, *supra*, 571; (281 U.S. 548) cf. *Callahan* v. *United States*, 285 U.S. 515, 518; *Walla Walla* v. *Walla Walla Water Co.*, 172 U.S. 1, 22; *International Alliance* v. *Rex Theatre Corp.*, 73 F. (2d) 92, 93."

In fact the rule that a general statute will not affect a special statute also applies in the case where the special statute is prior in time to the general statute. Thus in 59 Corpus Juris, Statutes, it is said (p. 1057):

> "It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, *unless it is repealed in express words or by necessary implication.*"

The same rule is stated in 50 American Jurisprudence, Statutes, p. 564.

In *Rodgers* v. *United States*, 185 U.S. 83, this Court said (p. 87):

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

After quoting from decisions in a number of other cases, this Court continued (p. 88):

> "In Black on Interpretation of Laws, 116, the proposition is thus stated:
>
> "'As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.'
>
> "So, in Sedgwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:
>
> "'The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, *unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.*'"

The above case has been often cited and followed by this Court. See, *e.g.*: *Washington* v. *Miller*, 235 U.S. 422, 428; *United States* v. *Berkeness*, 275 U.S. 149, 155–156.

Certainly it is not absolutely necessary, in order to give the provisions of the Norris-LaGuardia Act any effect, to so construe it as to prevent a court of the United States from enforcing by injunction an order of the Interstate Commerce Commission which it is specifically commanded to do by the provisions of said paragraph (12). Yet, according to this Court, unless there is such necessity, paragraph (12) must stand as an exception to the Norris-LaGuardia Act.

(3) THE NORRIS-LaGUARDIA ACT IS NOT APPLICABLE TO THE UNITED STATES WHICH, ACTING THROUGH THE INTERSTATE COMMERCE COMMISSION, IS ASKING FOR THE ENFORCEMENT OF THE COMMISSION'S ORDER.

In *United States* v. *United Mine Workers of America*, ... U.S. ...., 67 S. Ct. 677, this Court held that the Norris-LaGuardia Act was not applicable to the United States, saying (p. 686):

> "There is an old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect."

As previously pointed out, the Interstate Commerce Commission filed an intervening complaint in this suit on February 21, 1946, within nine days after the complaint of the plaintiffs was filed, in which it charged that the defendants were violating its order of May 16, 1922, and Condition 3 thereof, and in which it prayed for a preliminary and a permanent injunction "restraining and enjoining the defendants and each of them, their respective officers, agents, representatives, servants, employees and successors from (a) failing and neglecting to obey said order of the Commission of May. 16, 1922," and from "(b) violating condition 3 of said order of the Commission of May 16, 1922." (R. 47–49.)

As previously pointed out, paragraph (12) of Section 16 of the Interstate Commerce Act specifically gives the Commission authority to apply to the appropriate District Court of the United States for the enforcement of its orders. In its complaint the Commission alleged that Section 5 (8) of the Interstate Commerce Act (49 U. S. C. A. Sec. 5 (8)) gives the court jurisdiction to award the relief prayed for by it (R. 49).

Section 5 (8) provides:

> "The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a

violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order."

Section 5 (8) was first enacted as Section 5 (13) by the Act of June 16, 1933 (more than one year after the enactment of the Norris-LaGuardia Act) (c. 91, Title II, Sec. 202, 48 Stat. 217-220), and was amended and renumbered as Section 5 (8) by the act of September 18, 1940 (c. 722, Title I, Sec. 7, 54 Stat. 905).

That the Commission is an arm of the United States Government to which Congress has, by the Interstate Commerce Act, delegated certain of its sovereign powers, cannot be doubted. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 426, 427; *Inter-Mountain Rate Case*, 234 U.S. 476, 486.

Nor can it be doubted that in entering the order of May 16, 1922, and in seeking its enforcement, it is exercising such delegated powers of sovereignty. *N. Y. Central Securities Co.* v. *U. S.*, 287 U. S. 12; *Texas* v. *U. S.*, 292 U. S. 522; *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134.

There is obviously no legitimate reason why the Norris-LaGuardia Act should be a bar to a suit brought by the Interstate Commerce Commission to enforce its order if, as is this case, it would be no bar had the suit been brought by the Attorney General in the name of the United States. Either the Commission or the Attorney General is authorized to bring such suit under paragraph (12) of Section 16 of the Interstate Commerce Act.

Furthermore, the rules of statutory construction above discussed are peculiarly applicable to a suit brought by the Commission under Section 5 (8), first enacted after the passage of the Norris-LaGuardia Act, and being limited in its scope to the enforcement of orders issued under Section 5 of the Interstate

Commerce Act, under which section the order here involved was entered.

Therefore, for three reasons, each of which in and of itself is sufficient in the premises, the Norris-LaGuardia Act is not applicable to the present suit. These reasons are, (1) the suit does not arise or grow out of a labor dispute; (2) even if it did, a fundamental rule of statutory construction forbids the application of the Act to this suit; (3) the Norris-LaGuardia Act is not applicable to the United States which, acting through the Commission, is asking for the enforcement of the order.

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(4) THE CASES CITED BY APPELLANT DEALING WITH THE NORRIS-LaGUARDIA ACT HAVE NO APPLICATION.

In view of the foregoing considerations, only brief notice need be given to the cases cited by appellant (Br. pp. 29–31) in support of its position that the Norris-LaGuardia Act is applicable to this suit.

The case of *Trainmen* v. *Tol., P. and W. R. Co.*, 321 U.S. 50, simply holds that the Norris-LaGuardia Act prevents a railroad from procuring an injunction restraining violence on the part of its striking employees where it has not fully complied with the requirements of the Railway Labor Act (45 U.S.C.A. Secs. 151–164). That case is in no way applicable here.

Southeastern Motor Lines v. *Hoover Truck Co.*, 34 F. Supp. 390 (Dist. Ct., M.D. Tenn.), and *Lee Way Motor Freight* v. *Keystone Freight Lines*, 126 F. (2d) 931 (C. C. A. 10), are likewise inapplicable. In both cases the plaintiffs, who were motor carriers, were engaged in labor disputes with their own employees and their places of business were being picketed. Connecting motor carriers who customarily interchanged freight with plaintiffs had contracts with their employees which provided that they would not be required to cross picket lines. In

each case the plaintiff sued to compel the connecting motor carriers to continue to interchange freight with it. Mandatory injunctions were refused because a labor dispute was involved within the meaning of the Norris-LaGuardia Act. In both cases there were labor disputes between the plaintiffs and their own employees which had resulted in strikes, and the employers were seeking the aid of the general equity powers of the court to break the strikes. This is precisely what the Norris-LaGuardia Act prohibits. None of the three above mentioned considerations making the Norris-LaGuardia Act inapplicable to this suit obtained in either of those cases.

B.

Section 5 (2) (f) of the Interstate Commerce Act Has no Application to this Suit.

We have previously shown (pp. 31-33) that Section 5 (2) (f) of the Interstate Commerce Act and the case of *Gulf, M. & N. R. Co.* v. *Illinois Cent. R. Co.*, 21 F. Supp. 282, have no bearing on the issues raised in this suit and hence the alleged failure of the defendants to call the Court's attention thereto (Br. p. 35) has no tendency to show that the defendants' defense to the suit is or will be inadequate.

C.

Appellant's Suggestions as to the Matters Involved in a Defense to the Suit on its Merits are Frivolous and Were Not Made in the Court Below. Defendants' Answer Has Raised All Possible Defenses to the Suit on its Merits.

It is finally suggested by appellant (Br. 35-36) that a careful inquiry should be made into the exact provisions of the Commission's order, the report on which it is based, and the actual traffic and operating relations which existed between the River Road and the other carriers at the time of the entry of the

order; that most important of all, such an inquiry would show what employer-employee relationships then existed between the various carriers involved and their employees, and particularly between the River Road and its employees; and that without a complete investigation of such subjects it cannot be determined whether there is any conflict between the Commission's order and appellant's contract. It is further stated that no answer was filed by the River Road denying plaintiffs' charges that the order of the Commission was being violated until more than two months after the preliminary injunction was issued.

It should be noted that these suggestions regarding the matters which should be investigated in the suit have been made for the first time in this Court. No question concerning any of them was raised in the petition to intervene or in the accompanying motion to dissolve the preliminary injunction, etc. Furthermore, the suggestions are frivolous.

There is no possible doubt of the existence of the practice which plaintiffs and the Commission are seeking to compel the defendants to continue. It is admitted by appellant's motion to intervene (R. 90–91), alleged in appellant's affidavit tendered in support of its motion to dissolve the preliminary injunction, etc. (R. 104), alleged in the sworn complaints of the plaintiffs (R. 3) and of the Commission (R. 48), stipulated as a fact by the plaintiffs, the Commission and the defendants (R. 51–52), and found as a fact by the court below (R. 59–60). Furthermore, the only objection taken by appellant to the stipulation of facts in its motion to intervene is that it did not adequately call to the attention of the court "that this suit involves and grew out of a labor dispute and that any action taken by the court must be in compliance with the laws relating to injunctions in labor disputes." As to the suggestion that the relations existing between the various carriers and their employees, and particularly the River Road and its employees, should be in-

vestigated, it should be noted that presumably the appellant is peculiarly qualified and informed regarding the relations existing between the River Road and its trainmen, yet the most that appellant could, or at least did, allege in regard thereto in its petition to intervene is that appellant, as the representative of the River Road trainmen, had negotiated an agreement with the River Road "which is now and has been in effect for several years last past" (R. 90), which allegation is repeated in the affidavit in support of the motion to dissolve the preliminary injunction, etc. (R. 103), which affidavit also shows, as fully pointed out, *supra*, p. 14, that the alleged agreement was not made until 1937 or after.

Furthermore, the order of the Commission did not purport to change any employer-employee relationships existing between the River Road and its employees but the effect of the order was to maintain the status quo in respect thereto.

While it is true the answer of the River Road was not filed until more than two months after the preliminary injunction was issued, when it was filed it categorically denied that the Commission's order and Condition 3 thereof had been violated by the River Road (R. 84). This is more than appellant did in its petition to intervene or in the accompanying motion to dissolve the preliminary injunction, etc. As one of the numerous grounds alleged in support of its motion for a summary judgment in its favor, appellant alleged that the complaint did not contain allegations of any violation of the Commission's order (R. 101). This oblique denial, if it is a denial, that the order of the Commission was being violated, is the only suggestion of an attempt on the part of appellant to interpose a defense to the suit on its merits, although its petition to intervene and the accompanying motion were presented to the court two weeks after the answer of the defendants had been filed, which fully raised any theoretically possible defenses to the case on its merits.

No one can read appellant's petition to intervene and the accompanying motion to dissolve the preliminary injunction, assess damages against the plaintiffs and for a summary judgment in favor of appellant, and escape the conviction that the appellant was not interested in intervening for the purpose of defending the suit on its merits. Appellant made its motion to intervene in the hope of securing a judgment by the court which would enable the River Road trainmen to disregard with impunity any action which might be taken by the court to secure the observance of the order of the Commission. If the preliminary injunction were dissolved and a summary judgment entered for it, appellant would no longer be concerned with the adjudication of the case on its merits or with what might be the decision of the court regarding the obligation of the River Road to plaintiffs or to the public, in whose interests the Commission was primarily acting in making the order in question.

It is respectfully submitted that if it be assumed that appellant has any interest in this suit which would otherwise entitle it to intervene as a matter of right, that interest is being adequately represented by the defendants and hence appellant is not entitled to intervene as of right under Rule 24 (a) (2) of the Rules of Civil Procedure.

X.

NO STATUTE OF THE UNITED STATES GIVES THE APPELLANT AN UNCONDITIONAL RIGHT TO INTERVENE.

There remains to be noticed appellant's claim that two United States statutes give it an unconditional right to intervene (Br. p. 22–27).

Rule 24 (a) (1) of the Rules of Civil Procedure provides for intervention as of right "when a statute of the United States confers an unconditional right to intervene."

A.

Section 17 (11) of Part I of the Interstate Commerce Act Does Not Confer upon Appellant an Unconditional Right to Intervene.

Appellant insists that Section 17 (11) of Part I of the Interstate Commerce Act (49 U.S.C.A. Sec. 17 (11)) confers upon it an unconditional right to intervene, and that this section relates not only to proceedings before the Commission but to suits brought pursuant to the Act. Section 17 (11) provides:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees."

As originally enacted in 1887, Section 17 (24 Stat. 379, p. 395) related only to procedure before the Commission. It has been amended from time to time (25 Stat. 861 (1889); 40 Stat. 270 (1917); 41 Stat. 492 (1920); 47 Stat. 1368 (1933)) but, throughout these amendments, it has related exclusively to procedure before the Commission. The last amendment occurred in 1940 (54 Stat. 898 *et seq.*) and included, among other changes, addition of the provision above quoted. The Transportation Act of 1940, which carried this amendment, was a long measure making many amendments to the Interstate Commerce Act as a whole, but the subtitle, which preceded the amendments of Section 17, and which appears in the United States Code, read:

> "Commission procedure; delegation of duties; rehearings" (54 Stat. 898, 916).

Thus the subtitle of the amendatory act itself limits the scope of Section 17 (11) to proceedings before the Commission. Although it seems unnecessary, we may call attention to the reference to this amendment of Section 17 which is contained in H. R. Report No. 2832, 76th Congress, 3d Session, which

was a conference report on the Transportation Act of 1940. Discussing the action of the conference, it is said at page 72:

> "Section 13 of the House amendment rewrote section 17 of the Interstate Commerce Act *which deals with the administrative disposition of matters coming within the Commission's jurisdiction.* The revision included matter in sections 204 (e) and 205 (a) which contained provisions dealing with procedural matters under part II of the Interstate Commerce Act relating to motor-carrier proceedings. Such sections 204 (e) and 205 (a) were repealed. Among other things the revised section 17 provided for the assignment of work or functions to an individual commissioner, an examiner, or Board of examiners."

The question in any problem of statutory construction "is the intention of the enacting body," *U. S.* v. *Rosenblum Truck Lines*, 315 U.S. 50, 53, or, as has been frequently stated, "the intent of the law-maker is the law," *Jones* v. *Guaranty and Indemnity Co.*, 101 U.S. 622, 626. In arriving at the legislative intent, the title and subtitles, including section headings, *Maguire* v. *Commissioner*, 313 U.S. 1, 9, the whole Act and its parts in relation to each other, *White* v. *U.S.*, 305 U.S. 281, 286, and its legislative history, *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479, may be considered. As this Court said in *Harrison* v. *Northern Trust Co.* (p. 479):

> "But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'"

In view of the foregoing considerations, there can be no doubt but that Congress intended that Section 17 (11) should relate only to proceedings before the Commission, and that intent is the law.

Moreover, even if paragraph (11) relates to suits in courts as well as to proceedings before the Commission, it does not give an unconditional right to intervene, which it must give if Rule

24 (a) (1) is to be held applicable. A representative of employees of a carrier cannot intervene under paragraph (11) by a mere showing it is such a representative; there must be a further showing that the procedure "affects such employees," or, in other words, that it affects the interests of the employees. To determine whether there is any such interest involved as to permit intervention, resort must be had to the decisions dealing with the question of interest in relation to the right to intervene. We have already shown that there is no such interest.

B.

28 U.S.C.A. Section 45a Does Not Confer upon Appellant an Unconditional Right to Intervene.

As previously noted, after its petition to intervene had been denied, the appellant sought to amend its petition by adding to it an allegation that 28 U. S. C. A. Section 45a gave it an unconditional right to intervene (R. 138). Section 45a is long and involved and is set forth in the Appendix hereto. It seems doubtful that it has any application to this suit since it is specified that the Attorney General shall have charge of the interests of the Government in the suits therein referred to, and that the Attorney General shall not dispose of or discontinue a suit over the objection of an intervener. The first proviso to the section clearly relates to suits in which the validity of an order of the Commission is involved. The second proviso, upon which appellant relies, has to do with suits "relating to action" of the Commission. This clause is ambiguous, but the most reasonable construction of it would seem to be that it refers to suits relating to the validity of the Commission's orders, to which suits the United States is a necessary party, 28 U. S. C. A. Section 46, *Lambert Co.* v. *Balt. & Ohio R. R. Co.*, 258 U.S. 377, and hence the reference to the control of the Attorney General over the suits after intervention.

This suit, of course, does not involve the validity of the order of the Commission which has heretofore been finally adjudicated. It is simply an action to compel obedience to the order. However, assuming that Section 45a is applicable to this suit, it only gives an unconditional right to intervene to the Interstate Commerce Commission and any party or parties in interest who were parties to a proceeding before the Commission in which the order was entered. No one else may intervene except upon leave given, "and leave can be granted only to one showing interest." *Chicago Junction Case*, 264 U. S. 258, 268. *Cf. Boston Towboat Co.* v. *U. S.*, 321 U. S. 632, 633, 634. So again the question would be presented as to what interest a party must show in order to be permitted to intervene, and to answer this question resort would have to be had to the general doctrines of intervention as set forth in the rules of court and the decided cases, already fully discussed.

It is therefore respectfully submitted that no statute of the United States gives the appellant an unconditional right to intervene.

If either of the statutes referred to by appellant is applicable to this procedure, such statute confers only a conditional right to intervene and the application based thereon must fall within Rule 24 (b) relating to "permissive intervention." But as previously pointed out, the appellant in the court below abandoned any claim to permissive intervention (R. 155).

CONCLUSION

Appellant's contention that it is entitled to intervene because it is an indispensable party is wholly without foundation. Its right to intervene depends entirely upon its having a direct interest in the subject matter of the suit which intervention is necessary to protect.

It is submitted that appellant has not shown that it has such an interest. Its claim of interest is based upon an alleged con-

tract with the River Road, performance of which would nullify the antecedent order of the Commission, which this suit seeks to enforce. If appellant is aggrieved by the order, it may sue in court to set it aside, or petition the Commission to modify it. It may not attack it in this suit.

Even if the appellant had a contract which was antecedent to the order of the Commission (which it does not have), the Congressional power exercised by the Commission under the Interstate Commerce Act is amply adequate to impair it.

Appellant has failed to show that those on whose behalf it seeks to intervene would sustain any loss through the enforcement of the Commission's order.

Even if appellant had a valid contract with the River Road, the existence of such a contract would not give it the right to intervene. The validity of such a contract would not be adjudicated in this suit. That would be a matter solely between the appellant and the River Road in which neither the plaintiffs nor the Commission have any concern.

The fact that injunctive relief is sought and has been granted against appellant's members as agents of the defendants does not establish appellant's right to intervene.

For all of the foregoing reasons the appellant lacks the interest in this suit necessary to entitle it to intervene as a matter of right.

Even if appellant had shown such an interest in its members as would otherwise entitle it to intervene as of right (which it has not done), it has failed to show that such interest is not or may not be adequately represented by the defendants.

No statute of the United States gives appellant an unconditional right to intervene. Section 17, paragraph 11, of Part I of the Interstate Commerce Act refers exclusively to proceed-

ings before the Commission, in addition to requiring an interest, and 28 U. S. C. A. Section 45a requires that an interest appear.

The court below did not err in denying the appellant's petition to intervene. The appeal should be dismissed or the order of the court below denying intervention affirmed.

Respectfully submitted,

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APPENDIX

Section 45a, Title 28 of United States Code Annotated provides as follows:

"§ 45a. (Judicial Code, sections 212, 213.) Special attorneys; participation by Interstate Commerce Commission; intervention. The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceedings under sections 20, 43 and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefore by Congress for such purposes, and shall have supervision of their action: *Provided*, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: *Provided further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at

any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or nonaction of the Attorney General therein.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."